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(3)
No. 06-1709

IN THE
Supreme Court of the United States

DAVID EICHENLAUB, *et al.*,
Petitioners,

v.

TOWNSHIP OF INDIANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. THE CIRCUIT SPLIT IS REAL AND SUBSTANTIAL.

1. Respondents are wrong to suggest that the entrenched circuit split identified by the petition is no split at all. The Township attempts to "realign" four courts of appeals—the Second, Fourth, Fifth, and Sixth Circuits—by insisting that they use a standard identical to "shocks the conscience," even though they use entirely different words and concepts. Thus the Township asserts (Opp. 10) that the Second Circuit should be "realigned" with the Third, even though the Second Circuit has asked not whether an executive action "shocks the conscience" but whether it is "arbitrary or irrational" in the sense that there is no "legitimate reason" for

it. *O'Mara* v. *Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007); *Crowley* v. *Courville*, 76 F.3d 47, 52 (2d Cir. 1996). The Township likewise insists (Opp. 12) that the Fourth Circuit's test is indistinguishable from "shocks the conscience," even though the Fourth Circuit inquires whether action was "so arbitrary and irrational * * * as to be literally incapable of avoidance by any pre-deprivation procedural protections." *Tri-County Paving, Inc.* v. *Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002). The Township acknowledges that the Fifth Circuit has used a rational-basis test—but maintains that is no different from "shocks the conscience" because the court "recognized 'that reliance on substantive due process must be taken with the utmost care.'" Opp. 13 (quoting *Simi Inv. Co.* v. *Harris County*, 236 F.3d 240, 249 (5th Cir. 2000)). And the Township acknowledges (Opp. 14) that the Sixth Circuit has asked not whether executive action "shocks the conscience," but instead whether it is "willful and unreasoning * * *, without consideration and in disregard of the facts and circumstances of the case." *Brody* v. *City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001). No matter, says the Township: "that standard does not differ" from the test enunciated in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998).

But words have meaning, and different words carry different meanings. When courts use entirely "different words" like "legitimate reason" instead of "shocks the conscience" to measure a substantive-due-process claim, they are presumably not "equat[ing] the two phrases." *Doe* v. *Chao*, 540 U.S. 614, 630 (2004). Indeed, apart from its own say-so, the Township offers no reason to believe that the Second, Fourth, Fifth, and Sixth Circuits intended their carefully calibrated—and markedly different—standards to be mere synonyms for a precise term of art like "shocks the conscience."

And in fact those tests cannot be reconciled with "shocks the conscience." After all, the "shocks the conscience" formulation imports subjectivity into the substantive-due-

process inquiry that is not present in formulations like the rational-basis test. *See Kennedy* v. *City of Ridgefield*, 439 F.3d 1055, 1064-65 (9th Cir. 2006) (calling "shocks the conscience" a "subjective epithet[ ]"); *see also Lewis*, 523 U.S. at 857-858 (Kennedy, J., concurring) ("The phrase has the unfortunate connotation of a standard laden with subjective assessments"). Moreover, many of the above-quoted tests may be met by an executive action that—although irrational and arbitrary—may not be so outrageous as to shock the judicial conscience. A government action may be "so arbitrary and irrational * * * as to be literally incapable of avoidance by any pre-deprivation procedural protections," *Tri-County Paving*, 281 F.3d at 440, and yet may involve an issue too mundane to shock the conscience. And judges might agree that a government action is "willful and unreasoning," *Brody*, 250 F.3d at 438, without considering their consciences shocked.[1] For these reasons, the Township's attempt to discount cases like *O'Mara*, *Tri-County Paving*, *Simi Investment*, and *Brody* must fail. Each has contributed to a split in authority that justifies this Court's intervention.[2]

2. The Township takes another tack in explaining why this conflict is not really a conflict: It notes that in each of the circuits, at least one panel has spoken broadly about applying

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[1] Indeed, the notion that different substantive-due-process tests lead to different outcomes was at the heart of *United Artists*. The majority wrote that the "improper motive" test conflicted with "shocks the conscience" because "[i]n ordinary parlance, the term 'improper' sweeps much more broadly, and [prior case law n]ever suggested that conduct could be 'improper' only if it shocked the conscience." *United Artists Theatre Circuit, Inc.* v. *Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003).

[2] Furthermore, the Township does not even dispute the existence of a split among the State courts of last resort. *See* Pet. 20-21 & n.6. This division of authority is enough standing alone to warrant a grant of certiorari. *See* S. Ct. Rule 10(b).

the "shocks the conscience" test to all executive action. Opp. 11-14 (citing *O'Connor* v. *Pierson*, 426 F.3d 187 (2d Cir. 2005); *United States* v. *Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004); *Morris* v. *Dearborne*, 181 F.3d 657 (5th Cir. 1999)). But this only highlights the confusion and conflict among the federal courts of appeals. As we explained in the petition, each of these four circuits (i) has applied "shocks the conscience" in some substantive-due-process cases, (ii) has spoken in dicta about applying "shocks the conscience" across the board, but (iii) *has nevertheless continued to apply other tests in certain fact settings*. *See* Pet. 17-20. Thus, the Fourth Circuit declined to apply "'shocks the conscience" in *Sunrise Corp. of Myrtle Beach* v. *City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005), even though it was decided a year after the case (*Al-Hamdi*) that the Township says established across-the-board application of the test in that circuit. And the Second Circuit declined to apply "shocks the conscience" in *O'Mara*, even though it was decided two years after the case (*O'Connor*) that the Township says established across-the-board application of the test in that circuit.[3] These decisions beg the very question presented by the petition: "[w]hether * * * all substantive-due-process claims involving executive action are subject to the 'shocks the conscience' standard, or whether * * * only certain types of executive action are subject to that standard." Pet. i. To the extent the cases cited by the Township suggest *intra*-circuit divisions,

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[3] *O'Mara* and the host of other Second Circuit land-use cases that decline to employ the "shocks the conscience" test undercut the Township's reliance on *Natale* v. *Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999), a land-use decision that appears to use "shocks the conscience" but predates the *O'Mara* line. *See* Pet. 17 (citing *O'Mara* and other post-1999 cases). Likewise, the Township's reliance on *Banks* v. *City of Whitehall*, 344 F.3d 550 (6th Cir. 2003), is futile in the wake of the Sixth Circuit's later decision in *Warren* v. *City of Athens*, 411 F.3d 697 (6th Cir. 2005), which, like *Brody*, was a land-use case that eschewed "shocks the conscience."

they underscore the deep confusion, both within and among the appellate courts, about the correct standard to apply. *See Scarborough* v. *United States*, 431 U.S. 563, 567 & n.4 (1977) (granting certiorari because of a "split among the Circuits," some of which also had intra-circuit conflicts).[4]

3. With respect to the Seventh and Ninth Circuits, the Township is hard-pressed to deny that those courts have decided the question presented in a way that squarely conflicts with the Third Circuit's approach. *See* Pet. 14-17. Rather than confront what those courts actually held, the Township instead quibbles over factual distinctions in those cases that have nothing to do with the pure legal question they resolved in direct conflict with the Third Circuit's decision below. These conflicts alone justify certiorari.

The rule that the Seventh Circuit articulated in *Khan* v. *Gallitano*, 180 F.3d 829 (7th Cir. 1999), is clear: the "shocks the conscience" test is "*not generally applicable to all substantive-due-process claims*," but instead applies "for particular circumstances such as the high-speed chase in *Lewis* or pre-trial detention." *Id.* at 836 (emphasis added). This holding is in direct conflict with the Third Circuit's position. The Township's response is to assert that this holding is just "dicta." Opp. 15. Not at all. The court in *Khan* engaged in alternative analyses, one applying "shocks the conscience" and one applying another standard, and held that the claim before it failed under both. 180 F.3d at 836.

The Township also suggests (Opp. 15) that the Seventh Circuit's subsequent opinion in *Galdikas* v. *Fagan*, 342 F.3d

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[4] A final note as to these circuits: The Township cites *Conroe Creosoting Co.* v. *Montgomery County*, 249 F.3d 337 (5th Cir. 2001), and calls it "a land-use dispute" in which the Fifth Circuit applied "shocks the conscience." Opp. 13. That is wrong. *Conroe* is not about land use; it is about an invalid tax assessment and a property auction to pay off the delinquency.

684 (7th Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004), somehow limited *Khan*, but the opposite is true: the *Galdikas* court reaffirmed that *Khan* was still viable four years after its publication. Underscoring the confusion that *Lewis* has spawned, the Seventh Circuit in *Galdikas* emphasized that "the majority opinion in *Lewis* leaves a number of questions unresolved," including the scope of the "shocks the conscience" test. *Id.* at 690 n.3. It noted that the Seventh Circuit had previously identified this ambiguity in several cases, including *Khan* and *Armstrong* v. *Squadrito*, 152 F.3d 564 (7th Cir. 1998). *Id.* While the *Galdikas* panel noted that *Khan* and *Armstrong* took different approaches to substantive due process, it did not purport to side with *Armstrong* or otherwise to limit or overrule *Khan*. It instead skirted the question, noting that "[r]esolution of this ambiguity is not necessary to our decision." *Id.* Thus *Galdikas* both leaves *Khan* intact and dramatizes the chaos that exists in the lower federal courts. Not only are the courts sharply divided over when and how *Lewis* applies, but panels within the same circuit often struggle with this important question. This Court should grant the petition to clarify and unify the law.

The Township's effort to explain away the Ninth Circuit's decision in *Kennedy* v. *City of Ridgefield* is equally ineffective. The *Kennedy* court wrote that the circuit had "explicitly" considered whether to adopt a "shocks the conscience" standard in the context of a state-created-danger substantive-due-process claim and had refused. 439 F.3d at 1064 (citing *L.W.* v. *Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)). Hewing to that precedent, the court of appeals applied a "deliberate indifference" test, and emphasized that it would not consider whether the defendant's behavior shocked the conscience. *Id.* at 1065. This holding, again, is in direct conflict with the Third Circuit. The Township attempts to distinguish *Kennedy* by pointing out that another (separate) issue in the case had to do with the "extension of the 'state-created danger' doctrine." Opp. 16. That, though, is irrelevant: Many

decisions contain multiple holdings, but that does not impugn the precedential impact of any one of them.[5] The Township also argues that the Ninth Circuit "heed[s] [the rule] * * * that substantive due process claims should be analyzed under specific Amendments." Opp. 17. Again irrelevant. It is settled law that substantive-due-process claims are not cognizable when a specific constitutional amendment applies. *See Albright* v. *Oliver*, 510 U.S. 266, 274 (1994). That fact has nothing to do with how the court should proceed when no amendment applies. There is, in short, no colorable way to distinguish *Kennedy*.

4. We do, however, agree with the Township about one point: the First Circuit just recently changed course and joined the Third, Tenth, Eleventh, and D.C. Circuits in adopting an across-the-board "shocks the conscience" test. *See Mongeau* v. *City of Marlborough*, — F.3d —, 2007 WL 1793137 (1st Cir. June 22, 2007). Of course, this decision only sharpens the division within the courts of appeals; now instead of a seven-to-four split in the circuits, there is a narrower six-to-five split. Moreover, the First Circuit's recent decision exemplifies the recurring nature of the question presented and the evolving and disjointed approaches the federal courts of appeals continue to take in answering that question. This Court should grant the petition to resolve these deep divisions.

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[5] The Township resorts to the same legerdemain when addressing the eight-judge dissent from denial of rehearing *en banc* in *Kennedy*. *See Kennedy* v. *City of Ridgefield*, 440 F.3d 1091, 1092 (9th Cir. 2006) (en banc) (Tallman, J., dissenting). The Township contends that "the quarrel raised by the dissent" focused on the state-created danger doctrine. Opp. 16. True, but the dissent quarreled with other aspects of the panel decision as well. And in addressing the substantive-due-process standard, the dissent focused its criticism on the ground that "liability cannot attach here where no 'conscience shocking' abuse of power can be alleged." *Kennedy*, 440 F.3d at 1094 (en banc dissent).

II. THE TOWNSHIP'S ARGUMENTS ABOUT SUPREME COURT PRECEDENT AND PROCEDURE ARE MISTAKEN.

1. The Township contends that this Court has applied the "shocks the conscience" test post-*Lewis* in contexts other than law enforcement and prisons. Opp. 7. Its citations, however, make clear that this Court has not employed the test so broadly. The Township's first case, *City of Cuyahoga Falls* v. *Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), was a land-use decision that cited *Lewis* once in passing. But the phrase "shocks the conscience" appears *nowhere* in the decision. Instead, this Court measured the substantive-due-process claim in *Cuyahoga Falls* by looking for "arbitrary" or "egregious" conduct. *See id.* at 198-199. If anything, by carefully avoiding the "shocks the conscience" formulation, *Cuyahoga Falls* confirms that this Court has never endorsed a one-size-fits-all approach to substantive due process.

The Township fares no better with *Chavez* v. *Martinez*, 538 U.S. 760 (2003). As we explained in the petition (Pet. 25), this Court in *Chavez* used the "shocks the conscience" standard to assess the constitutionality of a coercive police interrogation of an arrested and hospitalized suspect. *See id.* at 764. But there is no dispute that "shocks the conscience" applies to the action of police officers and other executive officials where there is little or no time to deliberate. The question presented by this petition—and the one on which the lower courts are divided—is whether that standard applies categorically to *all* types of executive action.

2. The Township also repeats two procedural arguments—one involving timeliness and the other waiver—that it already presented to the Court.[6] Both arguments misapprehend this Court's precedents.

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[6] *See* Opp. to Mot. for Enlargement of Time (May 16, 2007).

a. The Township argues that the Petition is too late because it seeks review of an issue decided in *Eichenlaub I*. But we explained in the petition (Pet. 12 n.2) that this Court may—and often does—grant certiorari from a second appellate decision and "may consider questions raised on the first appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (emphasis added); *see also Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001); Robert L. Stern *et al.*, *Supreme Court Practice* 359 (8th ed. 2002).

The Township insists that this rule applies only "where this Court could not review the first decision." Opp. 4. Not so. In *Garvey*, the respondent likewise argued that because the "petition was filed more than 90 days after the [Ninth Circuit's decision in] *Garvey I*"—and because the petitioner could have sought certiorari then—this Court could not "consider a challenge raising issues resolved in that decision." 532 U.S. at 508 n.1. But this Court roundly rejected the argument: "[T]here is no question that the Association's petition was filed in sufficient time for us to review *Garvey II*, and we have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Id.* Because the Eichenlaubs timely petitioned for certiorari following *Eichenlaub II*, this Court can and should consider the important question resolved during *Eichenlaub I*.

b. The Township's waiver argument is likewise mistaken. An issue is properly presented so long as it was "pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). There is no question that the Eichenlaubs pressed for the "improper motive" standard below. After all, the magistrate judge and the District Court agreed that the Eichenlaubs had adequately alleged a substantive-due-process violation under that particular standard. *See* Pet. 7, 10. There is also no question that the issue was "passed upon" by the *Eichenlaub I* court, which acknowledged *United Artists* and reaffirmed the rule adopted there.

The Township nonetheless argues that the Eichenlaubs waived the issue because they "abandoned" it after *United Artists* and "embraced the 'shocks the conscience' standard without reservation." Opp. 5. The Eichenlaubs did no such thing. As the Township's own quotes from the briefs below reveal, the Eichenlaubs merely admitted what was indisputable: that the Third Circuit had adopted a new standard and that the *Eichenlaub I* panel was bound to apply it. Opp. 6. This Court has held that a party need do no more to preserve the issue. In *Williams*, for example, the petitioner had similarly conceded below "not that the responsibilities [that a recent panel decision] had imposed were proper, but merely that [the decision] had imposed them." 504 U.S. at 44. This Court refused to equate that with waiver. *Id.* And for good reason. To "impose, as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent * * * seems to us unreasonable." *Id.* The important question presented by the petition was pressed below and should be decided by this Court.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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